SUPREME COURT, U. S.

73 - 1343

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

HAROLD W. BROBECK, PETITIONER,

VS.

UNITED STATES OF AMERICA,
AND, THOMAS M. PLASKO,
SPECIAL AGENT, INTERNAL REVENUE
SERVICE,
RESPONDENTS.

PETITION TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW A JUDGMENT ENTERED BY THE THIRD CIRCUIT COURT OF APPEALS ON DECEMBER 3, 1973.

HAROLD W. BROBECK
PETITIONER
294 STATE STREET
BEAVER, PENNSYLVANIA
15009

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IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

Harold W. Brobeck, Petitioner,

vs.

United States of America,
and Thomas M. Plasko, Special
Agent, Internal Revenue Service,
Respondents.

PETITION TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW JUDGMENT ENTERED BY THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Your Petitioner, Harold W. Brobeck, having been first duly sworn deposes, states and respectfully represents and shows in his Petition to the Supreme Court of the United States as follows:

1. OFFICIAL REPORTS.

The opinion was filed in the Third Circuit Court of Appeals on December 3, 1973 and is attached hereto as Appendix "A" entitled and designated as "JUDGMENT ORDER".

2. JURISDICTION OF THE COURT.

The grounds upon which the jurisdiction of the Court is invoked is as follows:

This is a Common Law Petition for a Writ of Certiorari to seek review of the Judgment of the 3rd Circuit Court of Appeals. Jurisdiction is confered by Article III, Amendment V. and by 28 U.S.Code Section 1651 and 1254.

3. QUESTIONS PRESENTED FOR REVIEW.

A. Can a citizen be imprisoned for a Civil Contempt without assistance of Counsel of his Choice?

B. In an IRS Summons enforcement proceeding can a citizen be compelled to incriminate himself?

C. Does an IRS Summons enforcement Order have to designate records that are to be produced with reasonable certainty, and not be overly broad?

D. Does a contempt hearing have to be based upon an individual consideration of the individual questions involved asked by the revenue Agent at the enforcement hearing?

E. In an enforcement proceeding does the Court have jurisdiction to enter an Order for more material, or for other material than is requested in the IRS Summons?

F. In a Constructive Criminal Contempt, does the Trial Court, consistant with due process of Law, have to make complete findings of fact and conclusions of law upon every material issue?

G. Can a citizen be compelled to incriminate himself in a constructive contempt proceeding in violation of his rights as secured by the 5th Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment V.; "No person shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property without due process of Law."

2. Amendment I.; "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. Amendment IV.;"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

4. Amendment VI. "IN all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

5. Amendment IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

STATEMENT OF THE CASE

On August 3, 1973, Petitioner, Harold W. Brobeck was found in Constructive Civil Contempt of an Order of the U.S.District Court for the Western District of Pennsylvania entered on June 11, 1973.

The proceedings arose out of an enforcement proceeding pursuant to 26 U.S.Code Section 7604(a) to compell Harold W. Brobeck, in his alleged capacity as President of Beaver Valley Volkswagon Inc. to produce Corporate records of the corporation.

The proceedings were commenced in the trial Court by Order to Show Cause. No Summons and Complaint were ever issued.

The original trial was set for May 30, 1973 at 10:00 A.M. Brobeck showed up but the government did not show up for trial.

The trial was then set over Brobeck's objection to June 11, 1973. Brobeck did not appear at

the trial as his Counsel Jerome Daly could not be present. Brobeck's Motion to continue the case until July 9 was denied.

Without making any Findings of Fact, Conclusions of law or Order for Judgment or Judgment the Court entered an Order on June 11,1973 that "Harold W. Brobeck appear before Special Agent Thomas Plasko and provide corporate books, records and other papers of Beaver Valley Volkswagon Inc. relating to the tax liability of Harold W. Brobeck."

The Order of June 11,1973 went outside of the relief requested in the IRS Summons. There was no findings that at the time Harold W. Brobeck was an Officer or Agent of the corporation nor that he even was doing business as a corporation and likewise there was no findings that he had the custody of any corporate records or that any even existed at that time.

Brobeck testified that he stopped doing business as a corporation in July of 1971 as a corporation, that no stock was ever issued or paid for and that he had resigned as president in any event in July of 1971.

On June 18, 1973, Brobeck appeared before Special Agent Plasko who made no record of the proceedings. Brobeck has testified that Plasko never specifically asked for the Corporate Records.

On June 27, 1973 the Court entered its Order to show cause upon Brobeck why he should not be held in contempt of Court for what had occurred before Plasko.

On August 3, 1973 The Court made an Order finding Harold Brobeck in contempt of Court. Once again, the Court made no findings of fact or conclusions of law.

For instance, there were no findings that Brobeck disobeyed a specific valid Order of the Court. No finding that the Order was ever served upon Brobeck. No finding of a present ability to comply with the original order and to follow any direction the contempt court may give. There was no finding that the Order was not overly broad and that it was specific in describing the place and things to be produced with certainty.

There was no finding that considering all of the circumstances that the conditional confinement is necessary and reasonably likely to produce full or partial compliance.

On August 13, 1973 the Court denied Brobeck any further hearing or consideration and denied his Motion to make findings. ON that day Brobeck went to jail. He is still in the custody of the Court.

ARGUMENT

1. Petitioner, Brobeck cannot be imprisoned without having the full effective assistance of Counsel of his own choice.

Brobeck appeared in Court pursuant to his 1st Amendment right to Petition. He asked that his Counsel, Jerome Daly be permitted to speak for him and on his behalf. This is a plain denial of his right to freedom of personal association and freedom of speech. One of the citizens rights is freedom of speech. A part of that right is the right of the citizen to appoint a spokesman of his own choice to speak for him. The 1st amendment right to speech, assembly and petition extends to the Courts. See California Motor Transport Co. vs. Trucking Unlimited, Jan. 1972, 30 Led 2d 642.

At all stages of the proceedings before Brobeck was sent to jail his rights to Counsel or a spokesman of his choice were denied.

2. IN an IRS Summons enforcement proceedings the Court has no jurisdiction to enter an Order granting relief beyond what is requested in the pleadings.

Under 26 US Code Section 7604(a) the Court may have jurisdiction to enforce the relief asked for in the original IRS Summons, but it has no jurisdiction to enter an Order so broad as to be indefinite and not specific.

The Order of June 11,1973 went outside of the relief asked for in the pleadings. It was so broad that compliance to it was impossible.

The Order also was not specific. It was to broad. See Rice v. Internal Revenue Service,

355 F. Supp 605. " In order for there to be a contempt of Court, the order in question must be specific and definite as to what it prohibits and alleged contemptious conduct must clearly be in violation thereof."

3. The Court erred in not making any Findings of fact, conclusions of law and order for Judgment.

The trial Court's findings must contain at least the following:

A. That there is in existence a specific, valid Court Order.

B. That the Order claimed to be disobeyed was issued by the Clerk under the Seal of the Court and that it was served upon the person who was bound to obey it.

C. That the Order particularly describes the things to be produced.

D. That at the hearing before the Special Agent, the specific thing required to be produced be asked for by the Agent.

E. That there was a refusal without lawful excuse.

F. That there was a present ability to comply with the original order at the time it was to be complied with.

G. That the party directed to perform had notice and time to perform.

H. That considering all of the circumstances the Court formally determines that conditional confinement is necessary and reasonably likely to produce full or partial compliance. (Note: such a formal determination is necessary pre-requisite to confinement of the contemnor.) See Maggio v. Zeitz 333 U.S. 56.

The short and simple answer is that the Court did not make any findings at all. There is no basis for a Committment in the Alleghney County Jail for contempt.

See Rule 52 F.R.C.P. (a) Effect. "In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, and Judgment shall be entered pursuant to Rule 58.....Requests for findings are not necessary for purposes of review."

See U.S. vs. Thomas A. Shaheen, 445 F2d6; "Absence of any findings of fact or conclusions of law required vacation of Writ ne exeat republica restraining travel by taxpayer against whom United States had filed action to collect income tax deficiencies".

To the same effect, the Rule requiring findings on all specific issues tendered cannot be dispensed with. See Sanders Bros. Radio Station v. Federal Communications Commission, 106 Fed 2d 321."

See Walling v. Plymouth Mfg. Corp. 139 F.2d 178: C.C.A. Ind. 1944. "Failure to make a finding concerning whether one of officers of Mfg. Corp. who leased corporation's plant before fair Labor Standards Act lent to a finding that he was not an employer."

Here there was no finding what-so-ever that Brobeck was ever served with any Order of the Court..

The Constructive Criminal Contempt could only be based upon what had taken place before the Special Agent, Thomas Plasko, on Jume 18, 1973.

The Court made no specific findings on what occurred at that time.

No hearing was held to review the specific questions asked by the revenue agent.

See Daly v. U.S. 393 U.S. 873 which involved contempt proceedings, Constructive, for what occured before the Revenue Agent....."The Contempt proceedings required the Court to review the specific objections raised to the questions asked by the revenue Agent."....At least a proper hearing should make inquiry upon the individual questions involved."...." IN the instant case the first time the trial court had an opportunity to review the merits of the specific objections was on March 27, 1967. Yet neither the Court's findings of fact nor conclusions of law pass upon the merits of the questions, objections or the proceedings themselves.....however, a full hearing and determination could perhaps have brought into focus the specific reasons for the objection appellant raises."

The Order of June 11, 1973 was overly broad and did not encompass the relief requested for.

See D.I. Operating Co. v. U.S., 321 F2d 586, where after the Court reviewed the IRS Summons it stated in D.I. Operationg Co. v. United States, as follows: "Affidavits in oposition to the government's motion for order directing compliance with Internal Revenue Summons presented questions in regard to relevancy and materiality of certain items, necessitating a hearing and findings with respect to disputeed items.

4. The Court's Order of June 11 infringed upon Brobeck's rights against self incrimination.

The Order compelled Brobeck to produce not only his private papers, but it required him to produce corporate papers which were allegedly in his control and custody. Brobeck at a hearing held on or about October 8, 1973 did testify that he did not have the corporate records in his custody or control. Yet the Court demanded that he disclose their whereabouts. This is in violation the the 5th Amendment right against self incrimination. See Curico v. U.S. 354 U.S. 119. There Curico testified that he was a member and Sec. Treas. of a Union; that he was the custodian of records, but that he did not have them in his possession. He plead the 5th Amendment when asked as to their whereabouts. The Supreme Court stated:

"The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of non produced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the letter of the 5th Amendment."

Brobeck did not have to incriminate himself and he cannot be jailed because he would not incriminate himself. The Court's findings also do not touch upon this point.

The findings and conclusions should be separately stated so that there is no question and should be so fully stated that it is not necessary to have a complete transcript, but

only that part of the evidence that is necessary to have the contested parts of the case reviewed.

Likewise, the opinion of the Circuit Court does not even touch upon the lack of findings.

CONCLUSION

In the instant case, Petitioner, Harold W. Brobeck is found in Constructive Criminal Contempt of Court and is incarcerated since August 13, 1973 except for 2 brief releases from jail. The imprisonment is no longer to compell obedience, but on the contrary is to punish as Brobeck has repeatedly told Judge Miller that he cannot perform, and there is no clear and convincing proof as is required by Park vs. United States, 153 Fed 2d 66 that he can perform what is purportedly required.

For the above reasons the Contempt citation should be reversed.

WHEREFORE, Your Petitioner, Harold W. Brobeck prays that a Writ of Certiorari be issued by this Court directed to the Third Circuit Court of Appeals and to the U.S.District Court for the Western District of Pennsylvania to certify to the Supreme Court of the United States the complete files and records to the end that the Committment Order of August 3, 1973 and all Orders subsequent thereto be reviewed and reversed and for such other relief as may be authorized by law.

Respectfully presented,

Harold W. Brobeck

Harold W. Brobeck
294 State Street
Beaver, Pa. 15009

STATE OF PENNSYLVANIA

SS

COUNTY OF BEAVER

Harold W. Brobeck, having been first duly sworn deposes and states that he is the Petitioner herein. That he has read and subscribed to the foregoing Petition for a Writ of Certiorari and that the same is true to the best of his knowledge, information and belief.

Harold W. Brobeck

Harold W. Brobeck

Subscribed and sworn to before me this 28th of February 1974.

Notary Public

Notary Public, Beaver, Beaver County
My [illegible], 1975

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

U.S.A. Petitioner-Appellee

vs.

HAROLD W. BROBECK, etal Respondents-Appellants.

JUDGMENT ORDER

Harold W. Brobeck, appellant, appeals from an Order of the District Court entered on Aug. 3, 1973, directing him to appear before Thomas M. Plasko, appellee and Special Agent, IRS, and to produce corporate books, records and other papers of Beaver Valley Volkswagen, Inc. relating to the tax liability of Brobeck. He appeals also from an order entered on August 13, 1973, denying his motion challenging the orders of June 11, 1973 and August 3, 1973, on the grounds that the Court did not comply with Rule 52 on the Federal Rules of Civil Procedure and requesting that the taking of evidence be reopened so that he might show his inability to comply with the orders of June 11, and August 3, 1973.

Brobeck contends that the District Court failed to secure jurisdiction over him because of failure to comply with Rule 4 of the Federal Rules of Civil Procedure; that the Orders of June 11, 1973 and August 3, 1973 are void because of the Court's failure to comply with Rule 52 of the Federal Rules of Civil Procedure; that Agent Plasko's failure to make a record of a June 18, 1973 hearing before him precludes the court from basing a contempt order on what transpired at that hearing; that the court should have permitted Brobeck to show his inability to comply with the June 11,1973 order; and that the Court's order and the IRS Summons are overly broad.

After careful consideration of the briefs and the arguments of counsel, it is,

ADJUDGED AND ORDERED that the Judgment of

the District Court be and is hereby affirmed. Costs taxed against appellants.

Dated December 3, 1973.

BY THE COURT

ARLEN M. ADAMS
Circuit Judge

INTERNAL REVENUE SUMMONS

IN THE MATTER OF THE TAX LIABILITY
OF HAROLD W. BROBECK
BEAVER, PA.

TO: HAROLD W. BROBECK, as President of
Beaver Valley Volkswagen, Inc.

At 294 State Street, Beaver, Pa. 15009

You are hereby summoned and required to appear before Thomas M. Plasko and bring the following:

1. Payroll records pertaining to Harold W. Brobeck including cancelled checks, leger sheets or pages, and W-2 Forms for 1970 and 1971.
2. Expense account records for Harold W. Brobeck, including the supporting detail and cancelled checks for 1970 & 1971.
3. Loan account records covering loans to and from Harold W. Brobeck during 1970 & 1971.
4. Records of commissions paid to Harold W. Brobeck in 1970 and 1971, including cancelled checks, Forms 1099, and supporting detail.
5. All other books, records or papers covering payments to or from Harold W. Brobeck relating to any financial transactions between Harold W. Brobeck and Beaver Valley Bolkswagon, Inc.

Place, Massa Bldg. Beaver Falls, Pa. April 11,1973 at 1:00 P.M.

ORDER OF JUNE 11, 1973

NOW THEREFORE, it is ordered that Respondent Harold W. Brobeck, appear before Thomas M. Plasko at the Massa Bldg., 1501 - 8th Ave. Beaver Falls

Pennsylvania, 15010, on or before June 25, 1973 at 10:00 A.M. and provide corporate books, records and other papers of Beaver Valley Volkswagon Inc. relating to the tax liability of Harold W. Brobeck.

John P. Miller
UNITED STATES DISTRICT JUDGE

ORDER OF COURT

AND NOW, to-wit, this 3rd day of August, 1973 this matter having been heard on petition filed herein on June 27, 1973, to adjudge the respondent Harold W. Brobeck, in contempt it is by this Court,

ADJUDGED AND ORDERED that the respondent, Harold W. Brobeck, is in contempt of the Court because of his failure to obey the Order of June 11, 1973, requiring the production for inspection and copying of specified corporate records of Beaver Vally Volkswagen, Inc. or until such further Order of Court; and it is,

FURTHER ORDERED that respondent, Harold W. Brobeck, pay the costs for this proceeding.

John L. Miller
UNITED STATES DISTRICT JUDGE

SUPREME COURT

No. 73-1343

APR 25 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD W. BROBECK, PETITIONER

v.

UNITED STATES OF AMERICA AND THOMAS M. PLASKO, SPECIAL AGENT, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

No. 73-1343

HAROLD W. BROBECK, PETITIONER

v.

UNITED STATES OF AMERICA AND THOMAS M. PLASKO, SPECIAL AGENT, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Following a hearing before the United States District Court for the Western District of Pennsylvania, that court entered an order on August 3, 1973, holding petitioner in contempt because of his refusal to obey a prior order of the district court directing him to comply with an Internal Revenue Service summons. Petitioner was committed until he

obeyed the order (R. 25).[1] The court of appeals affirmed (Pet. 11-12).

The summons (Pet. 12) was issued pursuant to Section 7602(2) of the Internal Revenue Code of 1954, 26 U.S.C. 7602(2) and required petitioner, as president of Beaver Valley Volkswagen, Inc., to produce specified corporate records for the years 1970 and 1971 (R. 8-9). Petitioner appeared in response to the summons but refused to produce the summoned records, claiming his privilege against self-incrimination (Supp. R. 12-13). A petition to enforce the summons was then filed.

At the hearing held by the district court on June 11, 1973, at which petitioner did not appear, the agent of the Internal Revenue Service who issued the summons testified concerning its issuance and petitioner's refusal to comply. He also testified that the official records of the Commonwealth of Pennsylvania indicated that the corporation, Beaver Valley Volkswagen, Inc., was incorporated on October 31, 1963, that it was still in existence, and that petitioner was its president. Following the hearing, the district court ordered petitioner to appear before the agent on or before June 25, 1973, and to produce the corporate books, records, and other papers relating to his tax liability (R. 13). Although petitioner appeared before the agent on June 18, 1973, he de-

[1] "R." and "Supp. R" references are to the appendix and supplemental appendix respectively filed by petitioner and respondents in the court of appeals.

clined to furnish the summoned records because of fear of incrimination (R. 29, 30-33; Supp. R. 28-29).

On July 30, 1973, a second hearing was held on an order to show cause why petitioner should not be held in contempt. The agent testified that petitioner had appeared before him but had refused to produce the records (Supp. R. 26, 28-29, 33-34). Despite several warnings from the district court that this was petitioner's opportunity to present anything he desired in his defense (Supp. R. 41, 46), petitioner did not testify or produce any evidence. Petitioner again stated that he declined to produce any documents on the ground that to do so might incriminate him. (Supp. R. 38-40.) On August 3, 1973, the district court filed an opinion and entered an order holding petitioner in contempt (R. 18-25).

2. Petitioner argues (Pet. 5) that the refusal of the district court to permit one Jerome Daly to act as his counsel during the contempt hearing violated his First Amendment rights. Daly informed the district court that he was a former member of the bar of the State of Minnesota and had been disbarred.[2] The court thereupon stated that Daly could sit at counsel table but would not be permitted to examine witnesses or perform the functions of a duly licensed attorney (R. 21, n. 3). While a litigant normally has the right to retain counsel of his choice, this Court has held that absent some showing of a grave defect in the disbarment proceedings, the disbarment

[2] See *In re Jerome Daly*, 291 Minn. 488, 189 N.W.2d 176.

of an attorney operates to terminate his right to practice before the federal courts as well. *Selling* v. *Radford*, 243 U.S. 46. See also *In re Barton*, 54 F. 2d 810 (N.D. Cal.).

Indeed, if Daly had been permitted to represent petitioner in the comtempt proceeding, it is possible that such representation may have denied petitioner his right to "the assistance of counsel" under the Sixth Amendment. Cf. *Harrison* v. *United States*, 387 F. 2d 203, 212, n. 41 (C.A.D.C.). Under these circumstances, the district court was amply justified in refusing to permit Daly to examine witnesses or to perform the function of representing petitioner.[3]

3. Finally, petitioner urges (Pet. 8) that the order directing him to comply with the Internal Revenue Service summons infringed his privilege against self-incrimination. The summons, however, sought only corporate records and the Fifth Amendment privilege against self-incrimination does not bar the production of such records. *Hale* v. *Henkel*, 201 U.S. 43; *Wilson* v. *United States*, 221 U.S. 361; *Grant* v. *United States*, 227 U.S. 74. See also *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286, 288-289.

Petitioner's claim of privilege, moreover, relates to events which allegedly occurred at a subsequent hearing on or about October 8, 1973. That second hearing was held by the district court for the purpose

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[3] Petitioner's assertion (Pet. 5-6) that the district court's enforcement order went beyond the scope of the summons is similarly without substance. The summons only sought specified corporate records relating to two years (Pet. 12).

of determining whether petitioner in fact had custody of the records in question. He states that he testified at this hearing that he did not have the corporate records in his custody or control, and that he is improperly confined because he refused to incriminate himself by revealing their whereabouts in response to a demand by the district court. In fact, it was not until approximately August 13, 1973, more than a week after entry of the contempt order and after the commencement of his confinement, that petitioner first argued that he did not have custody or control of the summoned documents. His confinement, therefore, was not because of a refusal to testify concerning the whereabouts of the documents but because of his failure, without justification, to produce them.

The hearing to which petitioner refers actually took place on October 9, 1973. At the conclusion of that hearing, the district court determined that petitioner had not met his burden of establishing his inability to comply with the order to produce.[4] No appeal was taken from that determination. Any challenges to that determination cannot be raised for the first time in this Court. If petitioner can demonstrate the futility of continued application of the con-

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[4] We have lodged a copy of the transcript of this proceeding with the Clerk of this Court. The district court's memorandum and order of October 18, 1973, is set forth at Appendix A, *infra*, pp. 7-13.

tempt order, his remedy is an application to the district court to vacate that order.[5]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[5] Petitioner also contends (Pet. 6-8) that the district court did not make findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure. But the required findings appear in a memorandum opinion (R. 18-24) the district court filed on August 3, 1973. There was therefore compliance in all respects with Rule 52(a), which provides that "[i]f an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-389

UNITED STATES OF AMERICA, and THOMAS M. PLASKO, Special Agent Internal Revenue Service, PETITIONERS

v.

HAROLD W. BROBECK, as President of Beaver Valley Volkswagen, Inc. and BEAVER VALLEY VOLKSWAGEN, INC., RESPONDENTS

MEMORANDUM AND ORDER

MILLER, J.

Subsequent to the docketing of his appeal by the Third Circuit Court of Appeals, Harold W. Brobeck moved this Court for a further hearing to show his inability to comply with our Order of June 11, 1973, to produce specified books and records of Beaver Valley Volkswagen, Inc., for which his refusal, without adequate excuse or just cause, has resulted in his being held in contempt. In view of the posture of the proceedings, upon receipt of the motion, we forwarded it to the Clerk of the Third Circuit Court of Appeals. Thereafter, on September 27, 1973, the Appeals Court, after denying bail pending appeal and expediting the appeal, granted this Court leave to

conduct such further proceedings it deemed appropriate. Exercising our discretion, we granted Mr. Brobeck a further hearing to permit him to purge himself of contempt. Thus, the sole question is whether the respondent is presently able to comply with the production order previously made and whether he is disobeying that order.

The government's proof at the enforcement and contempt proceedings established a prima facie case of wilful failure to comply with the Order of this Court to produce the corporate records. Mr. Brobeck's Fifth Amendment claim did not excuse him from producing the records of Beaver Valley Volkswagen, Inc., for it is well settled that "books and records kept 'in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though the production of the papers might tend to incriminate [their keeper] personally.' *United States* v. *White*, 322 U.S. 694 699 (1944)." *McPhaul* v. *United States*, 364 U.S. 372, 380 (1960); *Rogers* v. *United States*, 340 U.S. 367, 372 (1951). At no time prior to his commitment did respondent even suggest to the government or this Court, notwithstanding two opportunities to do so, his inability to produce the records. On the contrary, respondent in face of the government's evidence adhered to his claim of constitutional privilege standing mute as to his inability to comply with our Order. Thus, we believe the government's proofs coupled with the respondent's failure to offer any evidence regarding his ability to

comply clearly supported fair and reasonable inferences of the existence of the corporate records and as corporate president, respondent could have produced them. By not offering any evidence as to his inability to comply on June 11th and August 3rd, the respondent did not meet the issues of possession or inability. Consequently, we have prior adjudication of these issues as of June 11th, which were not appealed by respondent but are now attacked by him. The government maintains this prior adjudication is res judicata and the legal or factual basis of our underlying order is not open to reconsideration. Accord, *United States* v. *Secor*, 476 F. 2d 766 (2 Cir. 1973). While *United States* v. *Secor*, supra, sustained a res judicata contention in a similar factual situation to the present case, we are cognizant of our Supreme Court's admonitions in *Maggio* v. *Zeitz*, 333 U.S. 56 (1948) to the effect that a contemnor be permitted to deny his present possession of the corporate books and to give any evidence of present conditions or intervening events which corroborate such a denial. The trial court is obligated to weigh all the evidence before it in determining whether or not there is actually a present ability to comply and whether failure so to do constitutes deliberate defiance. Thus the real problem concerns the evidence admissible in this proceeding.

The fact that the government had carried the burden of proof at the enforcement hearing and the production order had issued establishing prior possession, at a time when continuance thereof is the

reasonable inference coupled with no explanation at the contempt hearing, the contemnor is confronted by a prima facie case. Accordingly, the burden of rebutting the government's evidence is the respondent's and he "must assume an explanatory role or subject himself to reasonable inferences or circumstantial evidence." *Bass* v. *Hutchins*, 417 F. 2d 692, 698 (5 Cir. 1969); *Sheinman* v. *Chalmers*, 33 F. 2d 902 (3 Cir. 1929); *Maggio* v. *Zeitz*, 333 U.S. 56, 75 (1948).

At the hearing the respondent testified the corporate records ordered produced were not presently nor had they been in his control, custody or possession when initially sought by the Internal Revenue Service or when ordered to produce them. When pressed on cross-examination he claimed ignorance as to their whereabouts and on numerous occasions asserted a constitutional claim of privilege to include the Fifth Amendment. Admitting he was the corporate president and its sole capital contributor with 73% of the stock, although not issued, he claims he ceased employment in April 1970, but remained until July 1971 when the corporation allegedly ceased doing business. Reduced to bare bones, respondent's explanation amounts to a denial of possession, custody or control over corporate records and knowledge of their whereabouts since July 1971. He further claims discontinuance of business by the corporation in July 1971 with his succeeding to the business as a sole proprietorship.

The government on the other hand has through the testimony of former employees of the corporation clearly and convincingly established the existence and location of corporate records of the character ordered produced through March 1972; that Harold W. Brobeck was the president and dominant figure in the corporation beyond the alleged time frame it terminated operations; that a corporate Master Charge Account was active and maintained at Western Pennsylvania National Bank at least until April 1972; that no dissolution or wind-up documents were filed with the Commonwealth of Pennsylvania dissolving Beaver Valley Volkswagen, Inc. in accordance with Pennsylvania law; and the current business manager of the alleged corporate successor believes she saw corporate books and records for the year 1971 this year, 1973, [Tr. 127] and that generally these books and records are stored upstairs. [Tr. 127] Furthermore, all witnesses testified they did not remove corporate books and records and to their knowledge corporate records were not removed from the premises.

If we were to merely limit our consideration of respondent's evidence, as urged by the government, to that which does not contradict our production order, we believe his denial of present possession not sufficient to establish his inability to produce the corporate records for the years 1970 and 1971. However, when considering all of the respondent's evidence against that of the government's, his explana-

tion cannot be characterized other than as incredible. Before the Court stands the president of an obvious closed family corporation, which for the year 1970 had grossed receipts of $1,877,891.00 [Government's Exhibit "F"], who was the sole contributor of its capital and principal executive officer claiming in essence he lost control of the corporate records when the corporation allegedly terminated operations and he continued the automobile business as a sole proprietorship. The testimony and evidence is to the contrary making it unreasonable to believe respondent, a person who controlled the business to the extent he did, completely lost control of the corporate records. Therefore the bold denial of past or present possession of the corporate records for the years 1970 and 1971, or knowledge of their whereabouts, we believe, is not sufficient explanation to establish a present inability to produce the corporate records or destroy the evidence and inference of present possession where their existence and prior possession are so clearly indicated. Likewise, respondent's repeated assertions of the Fifth Amendment privilege against self-incrimination cannot be transformed into an adequate or plausible denial of continued possession of the corporate books and records. See *Dittmar* v. *Michelson*, 281 F. 116 (3 Cir. 1922), cert. denied 260 U.S. 738; 8 Wigmore, Evidence (McNaughton rev. 1961) § 2272, at p. 439 footnote. Thus, Mr. Brobeck has failed to purge himself of contempt.

This memorandum shall be deemed to embody findings of fact and conclusions of law required by Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A.

Dated: October 18, 1973.

/s/ John L. Miller
United States District Judge

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